INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
Brown v. *Commissioner*, 50 F. (2d) 842	5
Davison v. *Commissioner*, 81 F. (2d) 16	6
Knoernschild v. *Commissioner*, 97 F. (2d) 213	6
Levey v. *Smith*, 103 F. (2d) 643, certiorari denied, 308 U. S. 578	5
Mississippi Valley Trust Co. v. *Commissioner*, 72 F. (2d) 197, certiorari denied, 293 U. S. 604	6
Statute:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Section 303, as amended (U. S. C., Title 26, Secs. 412, 450, 461, 462, 463)	8
Miscellaneous:	
Treasury Regulations 80 (1934 Ed.):	
Article 47	9

325326—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 109

CHARLES LALOR BURDICK AND CHEMICAL BANK & TRUST COMPANY, TRUSTEES OF THE LAST WILL AND TESTAMENT OF WILLARD A. LALOR, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 24–32) is reported in 40 B. T. A. 1040. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 96–99) is reported in 117 F. (2d) 972.

JURISDICTION

The order of the Circuit Court of Appeals was entered February 27, 1941 (R. 99). The petition

for a writ of certiorari was filed May 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent bequeathed certain sums to the trustees of such educational institutions as his sister and nephew might select but provided that if the selection were not made within one year after probate the charitable bequests should lapse and become part of the residuary estate bequeathed to private individuals. There was no selection by the sister and nephew prior to his death, but within one year thereafter they organized an incorporated foundation for educational purposes to which they directed the executors to pay the bequests.

The question is whether the amounts are deductible from the gross estate under Section 303 (a) (3) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts as stipulated (R. 69–92) and as found by the Board (R. 24–30), so far as necessary here, may be summarized as follows:

Willard A. Lalor died testate October 9, 1934 (R. 25). His will was executed November 19,

1930 (R. 26), and probated March 20, 1935 (R. 70). By it Lalor bequeathed $100,000 to trustees of an educational institution which his sister, Anna Lalor Burdick, might select, and $300,000 to one which his nephew, Charles Lalor Burdick (son of Anna Lalor Burdick) might select (R. 26–27). Among other things, the decedent in his will declared that he had discussed his motives and expectations in respect of the establishment and maintenance of the funds above mentioned with his sister and nephew and that it was his intention to request them to make the selection of the educational institution at that time. The will further provided that, in the event the selection were made, the executors were to pay the bequests to such institution in the manner and upon such terms to be set forth in the written instrument to be filed with the will (R. 27). And finally, the will contained the following provision with regard to these bequests (R. 28):

> In the event no instructions in writing given by *Anna Lalor Burdick* and/or *Charles Lalor Burdick* shall have been so endorsed and filed with my Will and in the event my Executor hereinafter named shall not receive within one year after the date upon which my Will shall have been probated from either of them, a notice in writing designating the educational institution or institutions to the Trustees of which my Executor shall make payment of the bequests herein made, I direct that the legacy

> in respect of which there shall have been such a failure of selection shall lapse and the amount thereof shall be added to and form a part of my residuary estate.

The residuary clause of the will set up a trust for the benefit of the testator's sister, Anna Lalor Burdick, her son, Charles Lalor Burdick, and other individuals (R. 28, 74–79).

Within a year after the probate of the will, an educational institution, known as the Lalor Foundation, Inc., was organized exclusively for scientific and educational purposes, and the executors directed to pay the $400,000 in question to this institution. The amount was so paid to it by the executors on April 10, 1936 (R. 28–29).

The executors claimed a deduction from the value of the gross estate of the amount so paid as a charitable bequest of the decedent (R. 71). The Commissioner of Internal Revenue disallowed the deduction and, on the basis of that disallowance and other adjustments not here involved, determined a deficiency of $149,199.67 in estate taxes (R. 14–17, 20–24). The Board of Tax Appeals sustained the Commissioner's determination (R. 33), and the court below affirmed the Board's decision (R. 99).

ARGUMENT

The only question involved in this case is whether a bequest for educational purposes was made within the meaning of the statute. The

deduction for such gifts is limited by the statute to cases where the decedent has used sufficiently specific language so that the bequest may not be diverted to other uses. The petitioners rely principally upon asserted conflicts with *Levey* v. *Smith,* 103 F. (2d) 643 (C. C. A. 7th), certiorari denied, 308 U. S. 578, and *Brown* v. *Commissioner,* 50 F. (2d) 842 (C. C. A. 3rd).

Levey v. *Smith, supra,* is clearly not in point. In that case there was a definite testamentary bequest to a fraternal lodge and the deduction was denied because the lodge was not engaged exclusively in charitable work. Petitioners say that because the deduction in that case turned upon the activities of the lodge the deduction here should turn upon the activities of the Lalor Foundation, Inc., which was admittedly organized exclusively for scientific and educational purposes. The activities of the lodge were controlling in the *Levey* case because the decedent made a definite bequest to the lodge. Since the decedent here did not make a definite bequest to the Foundation, it is obvious that the question in the *Levey* case does not arise here. The question here is whether the decedent dedicated his gift to an educational use, not whether it was actually put to such use.

In *Brown* v. *Commissioner, supra,* the will directed the trustees to use the trust fund as they saw best, "bearing in mind the ideals of said Settlor with reference to the ownership of money

and to the ideas on the general subject as expressed by him from time to time." (P. 843.) The trustees expended part of the trust fund for a church. The decision turned upon the conclusion of the Circuit Court of Appeals that the decedent had during his lifetime clearly expressed to the trustees his desire that the church be built and that they were thus legally obligated to carry out his wishes (50 F. (2d) at page 845). In other words, the court held that the decedent's gift was definitely limited to the use to which it was actually put. No similar limitations were found to have been imposed upon the decedent's sister and nephew in this case and it is clear that they could have properly added the funds to the residuary estate from which they were both to receive annuities.

It is settled that a deductible bequest to charity must be absolute at the time of death and that there must be no contingency or uncertainty which may prevent the gift from taking effect. *Knoernschild* v. *Commissioner,* 97 F. (2d) 213 (C. C. A. 7th); *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. (2d) 197 (C. C. A. 8th), certiorari denied, 293 U. S. 604; *Davison* v. *Commissioner,* 81 F. (2d) 16 (C. C. A. 2d).

The general principles relied upon in petitioners' Points II and III are clearly not a sufficient reason for setting aside this settled rule.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
Special Assistants to the Attorney General.

JUNE 1941.